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Criminal Liability of Minor For Sale of Chatel Mortgaged Property

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COMMENTS

CRIMINAL LIABILITY OF MINOR FOR SALE OF CHATTEL-MORTGAGED PROPERTY

The question of the liability of a minor for the crime of selling chattel-mortgaged property (or property acquired under a conditional sales contract) is as yet undecided by the Supreme Court of Wisconsin. The problem presents an example of a situation not often the subject of criminal prosecution in the past which, due to changing conditions and times, is assuming more and more importance today. The acquisition of personal property by minors in any degree which would raise the problem of chattel mortgages thereon is of recent origin, its added importance being due in the main to the increase in purchase and ownership by minors of one item of personalty—the automobile. The automotive age has created or brought to the fore many legal problems of which this should be no exception. If the reader will keep in mind the relationship of automobiles to the problem, the practical importance of it should not be lost in the ensuing discussion.

Though the situation, from the standpoint, at least, of its importance, is relatively new, the statute under which it arises is not. It first appeared in Wisconsin in the Revised Statutes of 1858[1], and, as modified by subsequent legislative enactments, is today embodied in Section 343.69 of the Wisconsin Statutes, providing as follows:

> "Any mortgagor of personal property or any vendee under a conditional sales contract of personal property, who *during the existence of the lien or title created by such chattel mortgage or conditional sales contract* shall sell, transfer, conceal, remove or carry or drive away said personal property or any part thereof, without the written consent of the mortgagee or his assigns or of the conditional sale vendor or his assigns, as the case may be, *and with intent to defraud*, shall be punished by imprisonment in the county jail not more than one year or in the state prison not less than one nor more than five years or by fine not exceeding $1000."[2] (emphasis added)

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[1] R.S. 1858, c. 45, s. 12.

[2] Wis. Stats. (149) Sec. 343.69. Quoted above is the principal provision of the section, but it is to be noted that two other grounds are provided upon which a mortgagor of chattels may be convicted for their sale contrary to the provisions of the statute: hindering or delaying mortgagee in repossession of property (subsec. (b)) and sale of property without disclosing mortgage to purchaser (subsec. (c)). The discussion is devoted only to the principal provision on the ground that the same argument can be applied in the case of minors to defeat a prosecution under one of these two supplementary provisions. It would seem that to either charge the defense could be raised that the acts made crimes by subsections (b) and (c) are acts which amount to a disaffirmance of the contract, a right allowed the minor by the common law, the exercise of which was not made a crime by the statute.

It is fundamental in the law of contract that a minor may avoid his contracts at any time during minority or within a reasonable time after reaching majority.[3] This rule is general and there are exceptions, but for the present the concern will be with the general rule. The rule may have a rather startling effect in the case of a minor giving a chattel mortgage (on an automobile, for instance) with respect to his criminal liability under the above statute should he sell or otherwise dispose of the chattel so mortgaged in apparent violation of the statute. In order to render a minor guilty of a crime under section 343.69 two requisites are necessary, namely:

1. An enforceable lien or title created by the mortgage;[4] and
2. A disposition by the mortgagor of the mortgaged property in one of the various ways enumerated in the statute without the consent in writing of the mortgagee and with intent to defraud him.

As has been noted, the contract of a minor is voidable at his option either during his minority or within a reasonable time thereafter. It therefore appears that the chattel mortgage of a minor creates no "enforceable lien or title," since it is voidable, and that, furthermore, a sale by him of the chattel mortgaged property could never be "with intent to defraud" the mortgagee, as the statute requires, since a sale by a minor of such property is held to be a disaffirmance of his contract.[5]

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[3] 43 C.J.S. Infants, §71 and §75; Grauman, Marx and Cline Co. v. Krienitz, 142 Wis. 556, 126 N.W. 50 (1910); Covault v. Nevitt, 157 Wis. 113, 146 N.W. 115 (1914); Peterson v. Weimar, 181 Wis. 231. 194 N.W. 346 (1923); Olson v. Veum, 197 Wis. 342, 222 N.W. 233 (1928).

[4] 26 O.A.G. Wis. 105 (1937).

[5] Jones v. State, 31 Tex. Cr. R. 252, 20 S.W. 578 (1892). Defendant, a minor of 17, was convicted of disposing of mortgaged chattels by sale, contrary to the statute. On appeal, held: Reversed and remanded. "To hold one responsible for fraudulently disposing of mortgaged property, there must be a valid and subsisting mortgage enforceable at law. However solemnly executed a conveyance or mortgage of personal property may be by a minor, he may avoid it by sale or other act of disaffirmance . . . The law holds that infants are lacking in judgment and understanding sufficient to enable them to guard their own interests, and the law protects them against their own improvidence and the designs of others by allowing them to avoid any act, contract or conveyance not manifestly for their interest; and the general rule seems to be no express contract, when repudiated or disaffirmed by a minor, can be enforced against him . . . Now, courts refuse to enforce a contract against a minor when disaffirmed by him, and it is well settled he may repudiate any contract by refusal to pay or by sale and in other ways. If the statute prohibiting the sale of mortgaged property is to be construed as applying to him, when it strips him of the right to disaffirm the contract, the shield of protection given him by the common law, and places him helplessly in the grasp of his creditor, who, under the threat of criminal prosecution, forbids the sale of his crop or the payment of its proceeds to himself. Such a contract can never be held for the benefit of a minor, and courts, from the earliest times, have refused to uphold contracts with penalties against minors." Accord: State v. Plaisted, 43 N.H. 413, (1861); State v. Howard, 88 N.C. 651 (1883).

> "An infant's mortgage is not void but voidable. It is binding until it is avoided. Any act of his clearly showing his intention not to be bound by the mortgage is a sufficient avoidance of it. An unconditional sale of the mortgaged property is such an act."[6]

The situation presented is one where a minor is incapable of the criminal intent required by the statute to constitute the crime because of his civil disability to contract. When a minor has once disaffirmed a contract the same is void. A prosecution of a minor under section 343.69 then comes to this: ". . . that the State seeks . . . to be hold the defendant amenable to the criminal law for the violation of a void contract."[7] The essence of the argument is that *the statute cannot be applied where it would make a crime that which is the minor's common law right* without an express legislative declaration that the right has been abrogated. As applied to a minor the statute attempts to make the exercise of his right to disaffirm a crime.[8]

It is true that the statute does not expressly except minors from prosecution. However, the statute does require the existence of an enforceable lien or title and an intent on the part of the mortgagor to defraud the mortgagee, impossible when the mortgagor is a minor. It can be argued that the determining factor is not the absence of a provision in the statute excepting minors from prosecution, but rather the failure of the legislature to expressly include minors within the purview of it, since the minor has a right at common law to disaffirm and void his chattel mortgage by selling the property. The Supreme Court of North Carolina, in reversing the conviction of a minor under a statute similar to ours, stated the proposition thus:

> "The act, it is true, is very broad in its terms and contains no saving clause, but it presents a case where there is a concurrence of two laws—the one a statutory provision making the defend-

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[6] Jones on Chattel Mortgages, sec. 40.

[7] State v. Howard, *supra,* note 5. "An indictment . . . for disposing of crops under mortgage cannot be sustained, where it appears that the defendant is an infant. The alleged disposition is a disaffirmance of the contract and renders it void."

[8] It is to be noted that the statute under which the minor is prosecuted must attempt to make the *disaffirmance* a crime, despite the minor's common law right to disaffirm, in order that minority may be a defense. Section 343.69 is such a statute. But the disability to enter a binding contract is no defense to a prosecution under a statute which makes it a crime *to enter into* a contract, as, for example, a contract whereby defendant obtains property under false pretenses. 11 years after deciding Jones v. State, *supra,* note 5, the Court of Criminal Appeals of Texas was faced with such a situation in Lively v. State, 74 S.W. 321 (1903). The defense relied upon Jones v. State, but the conviction was affirmed and the court distinguished the two cases. Disability to enter a binding contract does not give a minor a right to fraudulently enter one, and consequently he may be prosecuted for such an offense; but his disability does give him a right to disaffirm, and a statute which attempts to make a crime of the exercise of that right may not be used against him. Accord: Vinson v. State, 124 Ga. 19, 52 S.E. 79 (1905); Babu v. Peterson, 4 Cal. (2d) 276, 48 P. (2d) 689 (1935).

> ant indictable for a violation of his contract, the other a provision of the common law exempting the defendant by reason of his infancy from the contract, because as to him it was void. 'Like two statutory laws,' says Bishop, 'they may stand well together up to a given point, and then they come in conflict. The rule in this case is that the prior law is not repealed, but at such point the one or the other simply gives way. For example, a statute general in its terms is always to be taken as subject to any exceptions which the common law requires. Then, if it creates an offense, it includes neither infants under the age of legal capacity nor insane persons,' &c. Bishop, Statutory Crimes."[9]

The rules that penal statutes and statutes in derogation of the common law are to be strictly construed would seem to add weight to this argument. The question of inclusion of minors within the statute is then essentially one of legislative intent, and, in the absence of an express provision including them, or some other indication of a legislative intention so to do, the common law right to disaffirm through sale must take precedence over the broad terms of the statute. The result is that minority becomes a valid defense to a prosecution under it, if the contract is voidable.

It is manifest that the criminal prosecution must stand or fall according as to whether or not the minor can avoid the contract. The disability to enter a binding contract is the factor which negatives any possibility of a crime under section 343.69. Thus, in cases which are exceptions to the general rule, cases in which the minor can be bound, he is within the purview of the statute and can be prosecuted thereunder the same extent as an adult. Minority alone is not the defense; minority coupled with the other circumstances which make the contract voidable constitute it.

A minor may not avoid every contract which he makes. He is bound by a contract for necessaries.[10] But to be necessaries the articles must supply the infant's personal needs.[11] Neither emancipation nor the fact that the minor engages in business removes incapacity to make general contracts, and purchases made in trade are not necessaries.[12] And, most important to the problem here discussed, the Wisconsin Court has held that, in the case of an infant of small earning power living with his parents near a city and having other means of transportation to and from his work, an automobile is not a necessary.[13] While the decision does not exclude automobiles from classification as necessaries as a

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[9] State v. Howard, *supra,* note 5.
[10] Wis. Stats. (1949) Sec. 121.02(2), Uniform Sales Act; Grauman, Marx and Cline Co. v. Krienitz, *supra,* note 3.
[11] Covault v. Nevitt, *supra,* note 3.
[12] Wallace v. Newdale Furniture Co., 188 Wis. 205, 205 N.W. 819 (1925); Schoenung v. Gallet, 206 Wis. 52, 238 N.W. 852 (1931).
[13] Schoenung v. Gallet, *supra,* note 12.

matter of law, it would seem to foreclose any consideration of them as such in the vast majority of cases.

The question also arises as to whether or not a minor may be estopped to disaffirm and thus bound to his contract. The general rule is that an infant cannot bind himself by estoppel.[14] But where the infant in fact has the discretion of an adult and makes an express fraudulent misrepresentation of his capacity to contract, thus inducing the other party to the contract to enter it, he is estopped to later plead minority to avoid the contract, but only if the contract is beneficial to him.[15] Mere failure to disclose age, when not asked and when no artifice is employed to mislead, is insufficient to work an estoppel.[16] From the nature of the conditions attached, it readily appears that a minor cannot often be bound by estoppel. Not the least of these conditions is the one prescribing that the contract must be beneficial to the minor. The North Carolina Court has gone so far as to say that a chattel mortgage can never be beneficial to a minor as a matter of law.[17] This view would seem somewhat extreme, for it is not inconceivable that, in a particular case, a chattel mortgage might be a benefit to a minor. However, in the ordinary case, such as the purchase of an automobile, the courts would probably be very reluctant to hold a chattel mortgage a benefit because of their opposition to a minor's coming of age saddled with debt and with what property he does have in jeopardy. But numerous instances present themselves for speculation as to how a court might hold on the question of beneficiality. In the case of a minor giving a chattel mortgage to secure the purchase price of necessaries the mortgage could be a benefit, though the problem is purely academic since the minor is bound on his contract for necessaries of which the mortgage is an incident. However, were the minor to give a mortgage on personalty already owned by him in order to raise ready cash with which to buy necessaries in a separate transaction from a third party, an interesting and practical problem is presented on the question of binding the minor to his mortgage on the theory of benefit when the other requisites of estoppel are present.

Having considered the problem arising from a prosecution under section 343.69, it becomes apparent that the remedy of a chattel mortgage against an infant mortgager for the sale without his permission of the mortgaged chattels is not a criminal action in the vast majority of cases, for it is the exception to the rule when a minor is bound to his contract, and the case must come within the exception if the prosecution is to succeed. The only "remedy," if it can be termed such, is an

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[14] Grauman, Marx and Cline Co. v. Krienitz, *supra,* note 3.
[15] *Supra,* note 14.
[16] *Supra,* note 14.
[17] State v. Howard, *supra,* note 5.

extraordinary amount of diligence and care on the part of prospective mortgagees. The amount of care required is illustrated by the fact that not even an express misrepresentation of age by a minor will avail to bind him if the mortgage is not beneficial to him. The common law declares that the risk shall be upon the adult party to the contract, and it prohibits the criminal prosecution of the minor party as the price to be paid for the exercise of the right to disaffirm, which it, in its wisdom, has granted.

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